

INSIGHTS

Bracewell Environmental Law Seminar – Fall 2016: Highlights on “The Desktop Regulator”

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On November 15, 2016, Bracewell’s Environmental Strategies Group hosted its third biannual Environmental Law Seminar in Houston. The seminar was attended by nearly 100 industry representatives and featured five guest speakers, including Senator Kay Bailey Hutchison, CSB Board Member Rick Engler, Center for Global Energy Policy Fellow Ronald Minsk, Woodward Clyde President and CEO Eric Washburn, and Spirit Environmental Program Manager Johnny Vermillion.

This is the second in a series of posts highlighting learnings from the seminar. [Click here](#) to read Matt Paulson's previous post on takeaways from the Strategic Permitting panel.

The Desktop Regulator: A Closer Look at the Future of Environmental Enforcement

Speakers:

Rich Alonso, Partner, Bracewell Environmental Strategies Group

Whit Swift, Partner, Bracewell Environmental Strategies Group

Tim Wilkins, Partner, Bracewell Environmental Strategies Group

The panel discussed the future of environmental enforcement, presenting first a high-level view of what we can expect from the Trump administration and how it compares to the Obama administration. The panelists also focused on what the day-to-day enforcement priorities of EPA and TCEQ may be in the near future, noting that enforcement resources are likely to continue to be scarce.

Bigger Picture – Then and Now?

There are competing issues vying for the EPA’s resources under any administration. In the Obama EPA, enforcement resources and the attention of upper-level management were consumed by high-profile cases and incidents, such as the *Deepwater Horizon* oil spill, the Flint, Michigan drinking water crisis, and the Volkswagen emissions scandal. As a result of these major matters, the Obama administration actually brought fewer enforcement cases in terms of numbers than the George W. Bush administration. Generally speaking, the Obama EPA focused its enforcement efforts more on programmatic issues, compliance incentives, rulemaking with

built-in compliance measures, and technology development over initiating enforcement actions. The reality contrasted starkly with the Obama EPA's goal of prioritizing enforcement in the oil and gas sector, on which the administration made only slow progress.

Looking forward to the next four years, we shouldn't expect the Trump EPA to cease all enforcement efforts. In any administration, the enforcement office can range from somewhat non-political (meaning that, regardless of the prevailing politics, *some* enforcement will continue) to a more activist approach with the enforcement office stepping up to offset what it perceives to be less effectiveness from the agency's program offices. Wherever a Trump EPA may fall on this spectrum, it is unclear whether comparable resources will continue to be available for enforcement or whether enforcement efforts may be slowed by additional budget or staffing cuts.

Like prior Republican administrations, the Trump EPA's enforcement priorities might reasonably be expected to focus more on bringing specific cases against perceived bad actors as opposed to pursuing broader initiatives targeting entire industry sectors. Whatever EPA does, we should also anticipate a rise in environmental citizen suits brought by non-governmental entities who have expressed their commitment to offset any perceived decrease in federal regulatory efforts or enforcement.

Getting More Bang for EPA's Enforcement Buck

"Doing more with less" isn't just for the private sector—this mantra also applies in the enforcement context. EPA, TCEQ, and other environmental agencies have long faced significant budgetary and staff constraints. And there simply isn't a plausible scenario in the current political climate where these agencies will receive either the mandate or the funds to significantly expand their enforcement teams. That being said, despite other directional changes, it will not be surprising if the Trump EPA chooses to employ some of the enforcement techniques and tools developed by the Obama EPA to minimize the resources its needs.

Under the Obama administration, EPA initiated a broad effort it called "Next Generation Enforcement" intended to produce more effective, less expensive enforcement by reducing the need for resource-intensive site visits to individual target facilities. Whatever the Trump EPA chooses to call it, it is likely that many "Next Gen" tools—such as advanced monitoring, increased self-reporting requirements, greater emphasis on searchable electronic reporting, expanded transparency and availability of environmental data online, added coordination between groups within the agency, and ongoing expanded use of information requests (to name a few)—will likely be in use by enforcers under the Trump administration because they make enforcement efforts cheaper and easier for the agency. For the same reason, like the Obama administration, the Trump EPA may also choose to rely on the General Duty clause of the Clean Air Act (Section 112(r)(1)) to show that it will punish high-profile incidents or high-risk activities even if they don't violate more specific programmatic laws or regulations.

Don't Forget Texas

TCEQ, too, has been a proponent of "Next Gen" enforcement principles and tools without branding its efforts as such. In recent years, much of the Commission's enforcement activity has originated with "desktop enforcement" that favors reviewing reports submitted by the regulated community in lieu of putting boots on the ground of a facility. This is unlikely to

change because TCEQ's enforcement branch also faces the type of resource constraints described above.

One example of TCEQ's use of these "desktop" enforcement tools includes using emissions event/STEERS Reporting or auditing Title V Deviation Report and Annual Compliance Certifications to determine whether to initiate an inspection or air enforcement action. TCEQ has similarly relied on discharge monitoring reports and soil monitoring to aid its water quality investigation and enforcement, and it has also employed these tools and techniques in the context of waste enforcement by using satellite imagery to monitor municipal solid waste facilities or reviewing mandatory self-certifications regarding petroleum storage tanks.

Practically speaking...

For industry, the implications of these new directions in enforcement begin with the reality that every report or certification a regulated entity submits is more likely than ever to be used as evidence against it and as the basis for the initiation of enforcement efforts. Careful review and quality control is key—regulated entities should check and recheck all submissions and all agency-published information with an enforcer's eye and be sure to correct any errors (yours or the agency's) promptly. The regulated community should also be on the lookout for new rulemakings that create additional reporting, certification, or third party verification requirements—as many recent rulemakings have. These types of requirements can create new burdens and give rise to new evidentiary issues.

As desktop enforcement continues to grow, it is critical that industry ensure that it retains the ability to correct or appeal errors that may crop up as a result of these new requirements. The regulated community should strive to share information regarding agency enforcement initiatives and efforts at information collection to help enhance preparedness as the agencies continue to move from company to company within industries, using what they learn from one to pursue comparable claims against the next.

Most importantly, companies should continue to look for ways to reduce upsets and other reporting triggers—an important objective in its own right, but also important to reducing events that provide "low hanging fruit" garnering enforcement attention.